NO. 41579-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TONY KIM WHITE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando

No. 10-1-00767-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove the prosecutor committed misconduct during rebuttal argument when the prosecutor properly invited the jury to assess the credibility of defendant's testimony after defendant argued that it proved his alibi?

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4. Was the omission of a component from special verdict form II harmless beyond a reasonable doubt when the associated school bus enhancement was proved by uncontroverted evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On February 18, 2010, the Pierce County Prosecutor's Office filed an information in Pierce County Cause No. 10-1-00767-1, charging

appellant, Tony White ("defendant"), with one count of unlawful possession of cocaine with the intent to deliver. CP 1. The State filed an amended information on July 6, 2010, which alleged four counts: Count I, school bus stop enhanced unlawful delivery of cocaine on or about the 19th day of January, 2010; Count II, school bus stop enhanced unlawful possession of cocaine with the intent to deliver on or about the 17th day of February, 2010; Count III, unlawful use of a building for drug purposes on or about the 17th day of February, 2010; and Count IV, unlawful possession of marijuana (forty grams or less) on or about the 17th day of February, 2010. CP 5-7. Defendant's case was called for trial on November 3, 2010. RP 1. The Honorable James R. Orlando presided over the trial. CP 115. The jury found defendant guilty as charged. CP 81-86, CP 116. Defendant had an offender score of six at sentencing. CP 91. Defendant's standard range sentence as to Count I and Count II was 60 to 120 months plus a consecutive 48 months for his two statutorily required 24 month school bus stop enhancements. *Id.* The standard range sentence as to Count III was 12 to 24 months. *Id.* The court imposed a concurrent 80 month base sentence as to Counts I and Count II with the consecutive 48 month enhancement, for a total sentence of 128 months in the department of corrections. CP 94. The court also imposed a concurrent 24 month sentence as to Count III and a concurrent 90 day sentence as to Count IV. CP 94, 101-103. Defendant filed a timely notice of appeal from the entry of his judgment. CP 117.

2. Facts

On January 19th, 2010, defendant invited Darien Williams ("Williams") over to his Tacoma apartment to buy crack cocaine. RP 57. At the time Williams was secretly working for the Pierce County Sheriff's Department as an informant. *Id.* Williams told Deputy Kory Shaffer about the deal. RP 57-58. Deputy Shaffer and his partner, Detective Ray Shaviri, decided to use the potential drug deal to conduct a controlled-buy operation aimed at collecting evidence of defendant's illicit activities. RP 26. The officers met Williams at a predetermined location to search him for contraband that could be introduced into the investigation. RP 28-29, 55, 57-59, 217. Once it was determined Williams was not in possession of any unauthorized materials he was provided a pre-recorded twenty dollar bill. *Id.*

Detective Shaviri drove Williams to defendant's apartment. RP 26, 29, 219. Detective Shaviri watched Williams enter defendant's apartment through the front door. RP 29-30, 42, 219. Williams met with defendant in his upstairs bedroom. RP 220. Defendant sold Williams a single "stone" of crack cocaine. RP 221, 389. Williams exited defendant's house three minutes later, returned to Detective Shaviri's car, and gave the crack cocaine to Detective Shaviri. RP 29-30, 221.[1]

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[1] Williams' testimony differed from the Shaviri's and Shaffer's in that Williams claimed he gave the crack cocaine to Shaffer instead of Shaviri.

On February 17, 2010, police executed a search warrant at defendant's apartment. RP 100, 420. The front door was reinforced from behind with a 2 x 4 braced against the adjoining stairway. RP 302. Sheila McCully ("McCully"), defendant and two other males were inside. RP 183, 349. The two males were seated on the living room couch. RP 349. An open package of plastic sandwich bags commonly used for narcotics distribution was found on the living room coffee table. RP 117-118. Two crack pipes were found under the living room couch. RP 118, 333. When the police entered defendant was walking out of his upstairs bedroom; McCully was located in the apartment's other bedroom. RP 108-109, 183, 298, 306, 329-332, 349-350, 364, 426. A surveillance camera mounted at the front door was linked to a monitor in defendant's bedroom. RP 115 - 116, 253, 304, 426. There was a second surveillance camera at the top of the stairway leading to defendant's bedroom. RP 304, 335. A search of defendant's bedroom revealed documents bearing defendant's name, a plastic container with cocaine residue, two cell phones, and "crib notes."[2] RP 117, 256, 258, 326-327, 329-332, 351, 390-391, 426. A K-9 search of defendant's bedroom closet uncovered a large bag containing six individually packaged smaller bags of crack cocaine. RP 117, 126-127, 258, 347, 352, 393, 426. The crack cocaine weighed forty three grams; its

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[2] "Crib notes" were described at trial as business ledgers used by drug dealers to keep track of revenue. *Id.*

estimated street value was between four and five thousand dollars. RP 127-128. A search of defendant's pockets revealed marijuana, prescription pills and $290 cash. RP 102-103, 107, 378. Police established that defendant's apartment was within 1000 feet of a designated school bus route stop. RP 72-77, 151-152, 186-187, 193, 262-263.

Defendant was the only defense witness called at trial. RP 412-447. Defendant admitted that he had lived at the apartment where the cocaine was discovered. RP 420. Defendant claimed that the bedroom in which the crack cocaine was found had been occupied by two other individuals that left the apartment ten minutes before police executed the search warrant. RP 427. Defendant admitted that drugs were being sold out of the apartment, but claimed he was not involved. RP 429. Defendant denied selling crack cocaine to Williams on January 19, 2010. RP 429.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE THE PROSECUTOR COMMITTED MISCONDUCT DURING REBUTTAL ARGUMENT BECAUSE THE PROSECUTOR PROPERLY INVITED THE JURY TO ASSESS THE CREDIBILITY OF DEFENDANT'S TESTIMONY AFTER HE ARGUED THAT IT PROVED HIS ALIBI.

A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. ***State v. Brett***, 126

Wn.2d 136, 175, 892 P.2d 29 (1995) (*citing* ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *see also* ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Challenged "arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)); ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); *see also* ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). If the prosecutor's argument was improper and the defendant made a proper objection, appellate courts consider whether there was a substantial likelihood that the comment affected the jury's verdict. ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (*citing* ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the defendant failed to make a proper objection, defendant must prove the prosecutor's argument was so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a proper instruction. *Id.*

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of the witnesses and arguing inferences about credibility based on evidence in the record. ***State v. Millante***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (*citing* ***Hoffman***, 116 Wn.2d at 94-95). For this reason "prosecutors may argue ... inferences as to why the jury would want to believe one witness over

another." *Id.* at 290 (*citing* ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). "The same rule has been applied as to the credibility of a defendant." *Id.* at 291 (*citing* ***State v. Adams***, 76 Wn.2d 650, 458 P.2d 558, *rev'd on other grounds by*, 403 U.S. 947, 91, S. Ct. 2273, 29 L. Ed. 2d 855 (1971) (it was not improper for the prosecutor to call the defendant a liar when the prosecutor referred to specific evidence, including defendant's own testimony, which demonstrated the defendant had lied).

"[I]t is permissible for the prosecutor to comment on the defendant's failure to call a witness provided that it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies that the absent witness could corroborate his theory of the case." ***State v. Blair***, 117 Wn.2d 479, 487, 816 P.2d 718 (1991) (*citing* ***State v. Contreras***, 57 Wn. App. 471,476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990). "The rational for this requirement is that a party will likely call as a witness one who is bound to him [or her] by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be." *Id.* (*citing* ***State v. Davis***, 73 Wn.2d 271, 277, 276-278, 438 P.2d 185 (1968). When a defendant advances an exculpatory theory that theory is not immunized from attack; "[o]n the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." ***State v. Contreras***, 57 Wn. App.

471, 476, 788 P.2d 1114 (1990)). "The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." ***State v. Jackson***, 150 Wn. App. 887, 885-886, 209 P.3d 553 (2009). "[A] prosecutor can question a defendant's failure to provide corroborative evidence if the defendant testified about an exculpatory theory that could have been corroborated by an available witness." ***State v. Barrow***, 60 Wn. App. 869, 872, 809 P.2d 209 (1991) (a prosecutor is entitled to comment on defendant's failure to support his own factual theories) (*citing* ***State v. Sinclair***, 20 Conn.App. 586, 569 A.2d 551, 555 (1990)).

In ***Blair***, police executed a search warrant at Blair's residence after a woman was observed purchasing cocaine from that location. 117 Wn.2d at 481- 482. The search that followed uncovered cash, cocaine, and "crib notes," which contained a list of people associated with numbers. 117 Wn.2d at 481- 482. Blair testified at trial that the names and numbers represented personal loans and amounts owed to him from card games. *Id.* at 483. Blair denied selling cocaine to the woman followed by police. *Id.* Blair only called one of the people listed on the "crib notes" to corroborate his defense. *Id.* The prosecutor responded by making the following argument:

> "Count the names up, and if he's telling the truth, then he knew that all of these people ... and those people weren't brought in to tell you those were gambling debts ... And if

> he didn't do that, couldn't you infer that their answer wouldn't have been, "It was a loan."

Id. at 483-484.

The Supreme Court held this argument was proper. *Id.* at 491. The Court specifically found the prosecutor did not engage in an impermissible shifting of the burden of proof as "nothing in the prosecutor's comments said that the defendant had to present any proof on the question of his innocence." *Id.*

The Court of Appeals upheld a similar argument in ***Jackson***, 150 Wn. App at 886. The prosecutor in that case referenced a defense witness's testimony by stating: "there was not a single shred of testimony in this case to corroborate [the defense witness's] story .... *Id.* at 885. The prosecutor then argued that the jury "should compare Jackson's evidence with the State's evidence." *Id.* The ***Jackson*** court explained the appropriateness of the State's argument by drawing a distinction between improper argument that implies a criminal defendant should be convicted for failing to provide evidence and proper argument that invites the jury to evaluate the credibility of defendant's evidence. *Id.* at 885-886.

The Supreme Court has placed limits on a prosecutor's use of missing-witness arguments. ***State v. Montgomery***, 163 Wn.2d 577, 598-599, 183 P.3d 267 (2008). Such arguments are only permissible if the potential testimony is material, the missing witness is particularly under the control of the defendant, the witness's absence is not satisfactorily

explained, and the argument does not infringe on a defendant's right to silence or shift the burden of proof." *Id.* (internal citations omitted) (improper for the prosecutor to argue defendant failed to call certain witnesses when the witnesses "were not akin to an alibi witness[es] who fail[ed] ... to testify...." The witnesses at issue were immaterial and their absence was adequately explained); *see also* ***State v. Dixon***, 150 Wn. App. 46, 207 P.3d 459 (2009)).

In the instant case defendant testified he did not sell cocaine to Williams on January 19, 2010. RP 429. Defendant asserted he was not at his apartment when the drug deal took place. RP 430, 440. Defendant claimed Vernel Rucks ("Rucks") drove him out of town that morning. RP 440, 442. Defendant testified Rucks was his former roommate. *Id.* Defendant also testified Rucks had been his friend for fifteen years and that they spoke to one another on the telephone everyday for the past four years. RP 440, 442-443. The defense rested without calling Rucks as a witness. RP 412-447.

The State requested a missing witness instruction pertaining to Rucks. RP 448. Defendant objected, claiming the defense did not have control over Rucks. RP 449. Defendant later argued the instruction was improper because it was only relevant to alibi whereas defendant was asserting unwitting possession. RP 451. The court declined to give the instruction. RP 452. The court told the State it was still "entitled to argue that the jury can assess defendant's version of any other witness, and to

look at the surrounding circumstance, et cetera." RP 452. The State sought further clarification of the court's ruling when it asked: "I assume that the court is not precluding me from arguing that the witness is not here." RP 453. The court answered: "Correct. And you can certainly say that ... [the jury is] entitled to judge his credibility, his version." RP 453. Defendant did not object to the court's ruling below or assign error to this ruling on appeal. RP 453; App Br.[3] at i. The jury subsequently received a proper instruction on reasonable doubt as well as the presumption of innocence. CP 55, Instruction No. 2. The jury was also properly instructed that it was the sole judge of credibility of the witnesses and that the lawyer's remarks are not evidence. CP 53, Instruction No. 1.

The State did not comment on Rucks' absence during closing argument. RP 459-481. The State did explain that it was solely responsible for proving defendant's charges. RP 460. The State also reminded the jury that the evidence comes from the testimony not argument. RP 461. The State then emphasized its burden of proof:

> "Because the defendant is charged with these crimes, I have to prove all the elements beyond a reasonable doubt. The judge read to you an instruction that says it's all on me. I'm the one that has to prove this beyond a reasonable doubt. I have to prove all of the elements of each of the crimes. If I failed to prove any of the elements, then you have to find

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[3] Appellant's Brief ("App. Br.")

> him not guilty of that crime. As I stated, I have to prove all these elements beyond a reasonable doubt."

RP 469-470.

During defense closing argument defendant claimed Williams' testimony was not credible. RP 482-483. Defendant then argued the relevance of his own testimony:

> "[Y]ou also heard from Mr. White who testified: It wasn't me. I wasn't the dude. I wasn't even there. That's evidence ... That's testimonial evidence. That came from the witness on the stand. Doesn't matter who elicited it, that [is] testimony. That's evidence now. The evidence is: It was not me. So now you have to judge the credibility of that statement versus the inconsistencies on the State's in regards to that January 19th incident ...The evidence presented by Mr. White was: It was not me. The officers do not testify who it was. The only one who allegedly can testify as to who it was is Mr. Williams and his credibility is very, very, very, suspect. "

RP 487-488.

During rebuttal, the State reaffirmed that it had the burden of proof before quoting the court's reasonable doubt instruction:

> "A reasonable doubt is such doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

RP 513; CP 55, Instruction No. 2. The State then addressed the court's instruction on credibility. RP 520-521. The State subsequently discussed defendant's alleged alibi in terms of the jury's responsibility to judge the credibility of each witness:

> "He testified that ... he wasn't home. Fixing the truck in the afternoon and in the evening all the way up until after midnight trying to cover the entire day. No one to corroborate that, although he's known for months that he was facing a charged committed on that day. And he also told you about his morning...[defendant said] I was with Vernel Rucks. And Vernel Rucks is someone he has known for 15 years, someone who, in recent years, he's been in contact with on a daily basis. They have called each other on the phone, so he knows Vernel Rucks' phone number. Knows where he lives. Yet Mr. Rucks was not here. Even though the defendant knew that he was facing this charge alleged to have been committed on that day. Consider that in deciding whether or not the defendant's testimony is believable."

RP 520-521. Defendant did not object to this argument, but now asserts that it constitutes misconduct. *Id*; App. Br. at i.

Defendant must prove that the State's rebuttal argument was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a proper instruction. ***Jackson***, 150 Wn. App. at 883. Defendant cannot meet this burden. The challenged argument properly invited the jury to consider Rucks' absence when it "decide[ed] whether or not defendant's testimony [wa]s believable." RP 520-521. This argument complied with the court's ruling that the State was "entitled to argue that the jury can assess defendant's version of any other witness ... look at the surrounding circumstance ... [and] judge [defendant's] credibility." RP 453. Defendant does not challenge the propriety of the court's ruling. It is difficult to show improper argument when it is consistent with an unchallenged ruling of the trial court. The challenged argument was

equally consistent with the court's instruction on credibility, which informed the jury it was the sole judges of the value or weight to be given to the testimony of each witness. CP 53, Instruction No. 1. The challenged argument also satisfied ***Montgomery***'s four-factor test. First, Rucks' testimony would have been material as Rucks was the only identified witness who could have corroborated defendant's alibi. RP 430, 440. Second, Rucks was particularly available to the defense. Rucks was not contacted by police during the events that culminated in defendant's arrest; conversely, defendant testified he had been friends with Rucks for fifteen years and spoke with him on the telephone every day for the last four years. RP 29-30, 42, 183, 219,349, 442-443. This testimony further established that defendant shared a special relationship with Rucks that would have bound Rucks to testify on defendant's behalf had his testimony been favorable. *Id.* Third, Rucks absence was never satisfactorily explained. There is nothing in the record to suggest Rucks would not have agreed to testify on defendant's behalf. RP 440. Defendant's alibi did not involve Rucks in criminal activity. Rucks therefore risked nothing by testifying to the innocuous fact of giving defendant a ride on out of town on the day of the January offense, provided it was true.

Finally, the State's argument did not shift the burden of proof to defendant. The State began the challenged argument by citing the court's instruction on assessing the credibility of witnesses. RP 520-521. The

State then invited the jury to consider defendant's failure to call Rucks as a witness when deciding whether defendant's testimony was believable. RP 520-521. The State never argued that its burden to prove each element of every offense was anyway mitigated by defendant's failure to corroborate his alibi. Instead, the prosecutor appropriately limited the suggested relevance of Rucks' absence at trial to the weight the jury should give to defendant's testimony. The challenged remark was also expressed in the context of a closing argument in which the State repeatedly reaffirmed that it was solely responsible for proving defendant's charges. RP 460, 469-470, 512-513.

Defendant's is further barred from the relief requested because he invited the State's response with his own closing argument. Remarks of a prosecutor, even if improper, are not grounds for reversal if they are invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. ***Russell***, 125 Wn.2d at 86 (*citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). When defendant objected to the State's missing witness instruction he represented to the trial court that he was not asserting an alibi defense. RP 451. The trial court ruled that the State was entitled to argue that the jury can assess defendant's version of any other witness to judge defendant's credibility. RP 453. The prosecutor nonetheless refrained from making any reference to Rucks absence during its closing

argument. RP 453, 459-481. In turn, defendant argued he could not have participated in the January offense because his testimony proved Rucks had driven him out of town before the underlying drug deal occurred. RP 440-442, 487-488. This argument eliminated any ambiguity regarding the materiality of Rucks' testimony and implied defendant's alibi testimony was uncontroverted. RP 487-488. The State's rebuttal argument was a reasonable response to defendant's alibi argument because it properly invited the jury to test the credibility of defendant's testimony as instructed. The State made it unmistakable that consideration of Rucks' absence only factored in deciding the believability of defendant's testimony. The State never implied that the State's burden of proof would be in anyway off set if the jury determined defendant's uncorroborated alibi was not credible. The State's argument was proper. Defendant's claim of prosecutorial misconduct should be rejected.

2. DEFENDANT FAILED TO PRESERVE AN OBJECTION TO TRIAL COURT'S SPECIAL VERDICT INSTRUCTION BECAUSE HE DID NOT OBJECT BELOW AND THE COURT'S INSTRUCTION DID NOT RESULT IN AN ERROR OF CONSTITUTIONAL MAGNITUDE.

"Before instructing the jury, the court shall ... afford ... each counsel an opportunity ... to object to the giving of any instructions ...." CrR 6.15(c). Thereafter, "[a]n objection to a jury instruction cannot be raised ... on appeal unless the instructional error is of constitutional

magnitude." ***State v. Dent***, 123 Wn.2d 467, 477, 869 P.2d 392 (1994) (*citing* ***State v. Fowler***, 114 Wn.2d 59, 69, 785 P.2d 808 (1990)). If the instructional error is not of a constitutional magnitude, then "whether the instruction was rightfully or wrongfully given, it [i]s binding and conclusive upon the jury, and constitutes ...the law of the case." ***State v. Hickman***, 135 Wn.2d 97, 102 n. 2, 954 P.2d 900 (1998) (*quoting* ***Pepper v. City Park Transit Co.***, 15 Wash. 176, 180, 45 P. 743, 46 p. 407 (1896)); *see also* RAP 2.5(a); ***State v. Hames***, 74 Wn.2d 721, 725, 446 P.2d 344 (1968). "[T]he law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury." ***Hickman***, 135 Wn.2d at 105.

Defendant filed proposed jury instructions at trial. CP 46-50. Defendant's instructions did not contain an alternative to the trial court's special verdict instruction. CP 80, Instruction No. 25. The trial court gave defendant an opportunity to object to its instructions before they were read to the jury. RP 456. When the court asked defendant if he had any exceptions to the court's instructions, defendant said: "no, your honor." RP 456. The jury consequently received a special verdict instruction that included the following language:

> "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that

> "yes" is the correct answer. If you unanimously have a reasonable doubt as this question, you must answer "no."

CP 80 Instruction No. 25 (emphasis added).

Defendants forfeited any objection to this instruction when he agreed to it at trial because it did not result in an error of constitutional magnitude. The constitution does not require nonunaminous acquittal of penalty-enhancing facts. *See* ***State v. Bashaw***, 169 Wn.2d 145-148, 234 P.3d 195 (2010); ***State v. Nunez***, 160 Wn. App. 150, 162-163, 248 P.3d 103 (2011) (***Bashaw*** instructional error does not violate due process and is waived on appeal if not preserved at trial); ***State v. Morgan***, ___ Wn. App. ___ No. 67130-8-I (2011) (Division I, Court of Appeals disagreed with its earlier decision in ***State v. Ryan***, 160 Wn. App. 944, 252 P.3d 895 (2011) and held a ***Bashaw*** error does not violate due process.); *contra* ***State v. Ryan***, 160 Wn. App. at 252. The ***Bashaw*** court reaffirmed its decision in ***State v. Goldberg***, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003), which held jury unanimity is required to find the presence of a penalty-enhancing fact but is not required to find its absence. *Id.* at 146-147 (*citing* ***State v. Goldberg***, 149 Wn.2d at 893). ***Bashaw*** justified this rule as a means of advancing several policy objectives such as judicial economy. *Id.* at 146 n. 7 ("This rule is not compelled by constitutional protections against double jeopardy ...but rather by the common law precedent of this court,

as articulated in ***Goldberg***."); *see also* ***Nunez***, 160 Wn. App. at 162-163; ***State v. Morgan***, ___ Wn. App. ___ No. 67130-8-I (2011) *contra* ***Ryan***, *supra.*

The Supreme Court's limited view of ***Bashaw***'s authority is well justified. A right to a nonunaminous acquittal of a special finding is without textual support in either the State or Federal Constitution. *See* Wash. Const. Art I § 21; U.S. Const. Amend. 6; U.S. Const., Amend 14. Nor is the ***Goldberg*** rule required by constitutional due process. A rule is fundamental under due process when it is one without which the likelihood of an accurate conviction is seriously diminished. ***Schriro v. Summerlin***, 542 U.S. 348, 352, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The ***Goldberg*** rule does not improve the accuracy of special verdict findings because a fact decided by a divided jury is unlikely to be more accurate than a fact decided by twelve jurors convinced of its truth beyond a reasonable doubt. ***Bashaw*** court implicitly recognized as much when it reaffirmed that "general verdicts in criminal cases, of course, must still be unanimous to convict or acquit." *Id.* at 145 Fn. 5 (*citing* Wash. Const. Art I § 21; ***State v. Stephens***, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). Finally, if the reversal of a sentencing enhancement was mandated despite a defendant's agreement to a ***Bashaw*** instruction at trial, there would be a near irresistible incentive for defendants to hold their

objections until appeal in order to turn an easily corrected drafting error into an automatic reduction of sentence.

Notwithstanding ***Bashaw***'s express reliance on ***Goldberg***'s common law authority, the defendant claims his special verdict instruction amounted to constitutional error by relying on ***Ryan***, 160 Wn. App. at 944. ***Ryan*** concludes the ***Bashaw*** court "strongly suggests its decision is grounded in due process, because the Court "identified the error as the procedure by which unanimity would be inappropriately achieved, ... referred to "the flawed deliberative process resulting from the erroneous instruction," and applied the constitutional harmless error standard. ***Ryan***, 252 P.3d at 897. Defendant's argument should fail because ***Ryan*** was incorrectly decided. *See* ***State v. Morgan***, ___ Wn. App. ___ No. 67130-8-I (2011) (Division I, Court of Appeals disagreed with its decision in ***Ryan***, holding Morgan waived a ***Bashaw*** error by failing to preserve his objection at trial.). ***Ryan*** primarily errs in finding constitutional significance in ***Bashaw***'s recitation of the procedural problems that may follow a ***Goldberg*** error. The Supreme Court's mere recognition of the ways in which a jury's deliberative process might confound the Court's policy objectives does not invest that rule with constitutional force. And there is no principled rational for interpreting "due process" as vesting penalty-enhancing facts with greater constitutional protection than the underlying offense, for it is the underlying offense that often carries the

more burdensome punishment and fundamentally alters a defendant's legal status. *See generally* ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As for ***Bashaw***'s use of the constitutional error standard, the Supreme Court is always free to apply a more protective harmless error standard than necessary to ensure the efficacy of its judicially created rules. ***Nunez***, 160 Wn. App. at 164-165. In this instance the Court cleared up any confusion that might otherwise have resulted from its decision to do so by expressly stating that its decision was not compelled by the constitution. 169 Wn.2d at 146 n. 7.

Assuming a ***Bashaw*** error has constitutional significance, the instructional error at bar was not manifest since the evidence in support of the jury's special findings eliminated the possibility of prejudice. For similar reasons the error was also harmless beyond a reasonable doubt. ***Bashaw*** applied the constitutional harmless error standard instead of requiring automatic reversal; accordingly, its decision to reverse ***Bashaw***'s sentence must have been made in relation to the facts before it. In ***Bashaw*** the special verdict form asked whether Bashaw's controlled substance delivery occurred within 1,000 feet of a bus stop. 169 Wn.2d at 137. At trial the distance between the delivery and the bus stop was proved through testimonial estimates and a measurement device the Court determined to have been erroneously admitted "with no showing whatsoever that [it] w[as] accurate." *Id.* at 143.

The evidentiary problems attending the special finding in ***Bashaw*** are not present in defendant's case. The evidence proving defendant's school bus stop enhancement was uncontroverted and overwhelming. RP 72-100, 185-193, 262-265, 412-447. The State established the distance between defendant's apartment and a school bus route stop through three witnesses: Deputy Shaffer, Deputy Brockway, and Lead Bus Router Maude Kelleher. RP 72-100, 185-193, 262-265. A measurement was conducted with a wheel counter that gauges feet. RP 74. Deputy Shaffer tested the device for accuracy by running it along a measuring stick before conducting the measurement. RP 75. Deputy Shaffer then walked with Deputy Brockway as they wheeled the device from the school bus route stop to defendant's apartment. RP 75. There was 881 feet from the school route stop to the sidewalk in front of defendant's sidewalk. RP 75, 98. Deputy Shaffer testified that defendant's house was set back 15 feet from where they stopped the measurement at the private property line and that defendant's apartment building was 30 to 40 feet from front to back. RP 76, 98. Deputy Brockway corroborated Deputy Shaffer's testimony about the measurement. RP 262-265. Lead Bus Router Maude Kelleher ("Kelleher") also testified that defendant's apartment was within 1000 feet of a designated school bus stop. RP 187-188. This finding was based on Kelleher's use of Tacoma School District's properly functioning bus-routing software. *Id.* Defendant did not present any evidence to dispute the accuracy of the State's measurement evidence. RP 412-447.

The evidence in support of the bus stop enhancements was overwhelming and uncontroverted, they should be affirmed.

3. DEFENDANT FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S SPECIAL VERDICT INSTRUCTION BECAUSE COUNSEL'S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND THE USE OF THAT INSTRUCTION HAD THE POTENTIAL TO REDUCE DEFENDANT'S SENTENCE ON APPEAL.

"The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 89 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgments or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel a defendant must prove that his counsel's performance was deficient and

that counsel's deficiency prejudiced the defense. ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (*citing* ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. ***State v. McFarland***, 137 Wn.2d 322, 335 880 P.2d 1251 (1995). "***Strickland*** begins with a strong presumption that counsel's performance was reasonable." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (*citing* ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (*citing* ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Although risky, an all or nothing approach that is at least conceivably likely to secure an acquittal is legitimate strategy. *Id.* at 42

> "Through the intervening years, the ineffective assistance of counsel exception to the issue of preservation requirement has become so pervasive that an ordinary, reasonably competent defense counsel routinely ignores rules requiring the presentation of defense proposed instructions as required under CrR 615(a) and, to a lesser extent, the taking of exceptions to the trial court's jury instructions as required under CrR 615(c). This decision appears to be based on the fact that the invited error doctrine has been pretty consistently enforced ... while the ineffective assistance of counsel argument has undermined normal preservation requirements and resulted in appellate courts reviewing the merits of issues never presented to or decided by the trial court. As such ... the failure to propose or except to instructions has become either a tactical

> decision which cannot form the basis of an ineffective assistance of counsel claim, or has become conduct so pervasive that the ordinary, reasonably prudent defense counsel intentionally fails to comply with court rules requiring issue preservation to provide what amounts to de novo review of the trial on appeal ... Accordingly, such conduct does not fall below that of the ordinary, reasonably prudent defense counsel and the first Strickland prong is not satisfied."

In re Crace, 157 Wn. App. 81, 117-118, 236 P.3d 914 (2010) (Quinn-Brintnall, J. dissenting).

The instant trial began with preliminary motions. RP 11-14. Defense counsel secured a pretrial ruling that authorized him to impeach the State's informant with the negotiated terms of his felony drug conviction. RP 13. Counsel later represented defendant in a hearing held pursuant to CrR 3.5 where he challenged the admissibility of defendant's statements to law enforcement. RP 80-93. Counsel cross-examined twelve of the State's fifteen witnesses at trial. RP 32-47, 133-173, 187-193, 204-207, 225-241, 263-273, 276-278, 287-293-295, 315-323, 340-344, 356-364, 395-400, 403-404. The three witnesses counsel refrained from questioning did not provide evidence in conflict defendant's claims of unwitting possession and alibi. RP 366-370, 371-379, 405. Counsel also made several objections to the prosecutor's questions; the court sustained counsel's objection to the State's use of a leading question and as well as a question that ostensibly called for information outside a witness's personal knowledge. RP 275, 365. Counsel then presented

evidence to support defendant's theory of the case. RP 420-430. Counsel proposed several instructions as well as successfully opposed the State's proposed instructions on accomplice liability and the missing witness doctrine as to Rucks. RP 414-417, 449-452; CP 46-50. Counsel did not object to the court's special verdict instruction notwithstanding the fact that defendant's case was called for trial four months after the ***Bashaw*** court decided that the language used in a similarly drafted instruction was error. RP 1; 169 Wn.2d at 133, 201.

Defendant can not prove that his counsel's performance fell below the objective standard of reasonableness for failing to object to the trial court's special verdict instruction. "The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United Cronic***, 466 U.S. at 656. Counsel challenged the admissibility of State's evidence, subjected the State's witnesses to meaningful cross examination, and presented defendant's theory of the case. RP 32-47, 80-93, 133-173, 187-193, 204-207, 225-241, 263-273, 276-278, 287-293-295, 315-323, 340-344, 356-365, 395-400, 403-404, 414-417, 420-430. Defense counsel also made proper objections and successfully opposed two of the State's proposed instructions. RP 275, 365. Defendant does not allege that any of these activities were unsatisfactorily executed, let alone establish that they were so unprofessionally conducted that his counsel upset the adversarial balance between defense and prosecution. App.Br. 43. Instead, defendant

bases his claim of ineffective counsel solely on his attorney's failure to object to a single instruction. *Id.* To prevail on his claim defendant would have to prove that his counsel's performance throughout the entire trial fell below the objective standard of reasonableness. Defendant cannot make this showing by establishing that his counsel might have made an isolated mistake which does not call the fairness of defendant's trial into question.

Defendant is also incapable of proving that his counsel fell below the objective standard of reasonableness because there was a predictable tactical advantage in withholding any challenge to the court's special verdict instruction until defendant's appeal. The ***Bashaw*** court reaffirmed the ***Goldberg*** rule, which held which held jury unanimity is required to find the presence of a penalty-enhancing fact but is not required to find its absence. *Id.* at 146-147 (*citing* ***State v. Goldberg***, 149 Wn.2d at 893). Similar to defendant, Bashaw was charged with a controlled substance offense enhancement that required the jury to determine whether her underlying offense took place within one thousand feet of a school bus route stop. *Id.* at 137. Bashaw's jury was similarly instructed that "[s]ince [it was deciding] a criminal case, all twelve of [them] must agree on the answer to the special verdict." *Id.* at 139. Following Bashaw's conviction the Supreme Court vacated Bashaw's sentencing enhancement after deciding its unanimity language was not harmless beyond a reasonable doubt in Bashaw's case. *Id.* at 148. Although the ***Bashaw*** court expressly

stated that the application of ***Goldberg*** rule to Bashaw's special verdict instruction was not compelled by constitutional protections, the Supreme Court's application of the constitutional harmless error analysis led to confusion about whether a ***Bashaw*** instruction resulted in error of a constitutional magnitude that could be raised for the first time on appeal. To date, Division III, Court of Appeals has answered that question differently than at least one panel of Division I. *See* ***State v. Nunez***, 160 Wn. App. 150, 162-163, 248 P.3d 103 (2011) (***Bashaw*** instructional error does not violate due process and is waived on appeal if not preserved at trial); ***State v. Morgan***, ___ Wn. App. ___ No. 67130-8-I (2011) (Division I, Court of Appeals disagreed with its earlier decision in ***State v. Ryan***, 160 Wn. App. 944, 252 P.3d 895 (2011) and held a ***Bashaw*** error does not violate due process).

It is at least conceivable that defendant's counsel interpreted ***Bashaw*** as the ***Ryan*** court did and tactically refrained from objecting to court's special verdict instruction. If such a reading of ***Bashaw*** proved correct, defendant's sentence enhancements might have been vacated on appeal without the possibility of retrial. As explained above, defendant's sentence enhancements were supported by overwhelming and uncontroverted evidence. RP 72-100, 185-193, 262-265. With the likelihood of acquittal extremely low, defense counsel had a clear incentive to hold his objection with the hope that this Court would treat improperly preserved ***Bashaw*** errors like the ***Ryan*** court. The tactical

opportunity presented by ***Bashaw***'s debatable ambiguity makes it impossible for defendant to prove the absence of any conceivable legitimate tactic explaining counsel's performance. Defendant's ineffective assistance of counsel claim should be rejected.

Defendant is equally incapable of proving that he was prejudiced by his counsel's failure to object to the trial court's instruction. "To meet the requirement of th[is] second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***State v. Garrett***, 124 Wn.2d 504, 519, 881 P.2d 185 (1994) (*citing* ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). There is absolutely no reason to believe that the receipt of a proper instruction would have changed the jury's decision in this case. The school bus enhancement at issue was proved through the uncontroverted testimony of three professional witnesses. RP 72-100, 185-193, 262-265, 412-447. Defendant cannot prove the prejudice that ***Strickland***'s second prong requires; the enhancements should be affirmed.

4. THE OMISSION OF A COMPONENT FROM SPECIAL VERDICT FORM II WAS HARMLESS BEYOND A REASONABLE DOUBT BECAUSE THE ASSOCIATED SCHOOL BUS STOP ENHANCEMENT WAS PROVED BY UNCONTROVERTED EVIDENCE.

Although special verdict components are not elements of an underlying offense, instructional errors as to elements can be similar to errors that appear in special verdict instructions. *See generally* ***State v. Gordan***, ___ Wn.2d ___, ___ P.3d ____ (No. 84240-0) (2001). In this case, a useful legal framework for analyzing the assignment of error to defendant's special verdict form II can be found in cases that address the omission of a necessary element from a trial court's instructions. Since the error in special verdict form II would be harmless under the higher constitutional error standard applied to missing elements, the associated sentence enhancement should be affirmed.

Washington Supreme Court has held "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." ***State v. Brown***, 147 Wn.2d 330, 339-340, 58 P.3d 889 (2002) (*quoting* ***Neder v. United States***, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 35 (1999); *see also* ***State v. Weaville***, 162 Wn. App. 801, 434, 256 P.3d 426 (2011); ***State v. Aumick***, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); ***State v. Scott***, 110 Wn.2d 682, 689, 757 P.2d 492 (1988).

Consequently, "the omission of an element is an error that is subject to harmless-error analysis[;] ... [t]hat test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Neder,*** 527 U.S at 15; *see also* ***Brown***, 147 Wn.2d at 341. "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." ***Brown***, 147 Wn.2d at 341 (*citing* ***Neder***, 527 U.S. at 18). "The harmless-error doctrine ... recognizes the principal that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, ... and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." ***Neder*** , 527 U.S. at 18 (*citing* ***Delaware v. Van Arsdall***, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). "A reviewing court making this harmless-error inquiry ... asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not reflect a denigration of the constitutional rights involved." ***Neder***, 527 U.S. at 19 (internal quotation marks and citations omitted).

Defendant was charged by amended information with two school bus route stop enhanced controlled substance offenses. CP 5-7. It was alleged defendant committed the underlying controlled substance offenses "within 1000 feet of a school bus route stop, contrary to RCW 69.50.435."

Id. Uncontroverted evidence proved the controlled substance offenses underlying both enhancements occurred within one thousand feet of a designated school bus route stop. RP 26, 29-30, 60, 72-100, 117, 219, 221, 126-127, 185-193, 258, 262-265, 281, 352, 393, 420, 426. The jury received two special verdict forms associated with the underlying offenses. CP 82, 116. The special verdict form I posed the following question:

> "Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?"

CP 82. The jury indicated their unanimous agreement by answering the question "Yes." CP 82. The Special verdict form II asked whether "defendant possess[ed] a controlled substance with intent to deliver the controlled substance at any location?" CP 116. The jury also answered this special verdict form in the affirmative. CP 116.

The question posed to the jury in special verdict form II erroneously omitted a component of the associated school bus stop enhancement. Special verdict form II should have asked the jury to decide whether the underlying offense occurred at any location "*within one thousand feet of a school bus route stop designated by a school district.*" RCW 69.50.435; CP 82; CP 116. This error was nonetheless harmless beyond a reasonable doubt since the evidence that proved the distance

between defendant's apartment and the school bus route stop at issue was uncontroverted. RP 72-100, 185-193, 262-265, 412-447. There was no dispute that both underlying offenses occurred at defendant's apartment. RP 26, 29-30, 60, 100, 117, 219, 221, 126-127, 258, 281, 352, 393, 420, 426. It was also conclusively established that defendant's apartment was within 1000 feet of a designated school bus route stop. RP 72-100, 185-193, 262-265. When the identical geographic-proximity evidence as to both Count I and Count II is coupled with the jury's affirmative response to properly drafted special verdict form I, there is no reason to believe that a properly drafted special verdict form II would have caused the jury to answer special verdict form II differently than special verdict form I. The omission was therefore harmless beyond a reasonable doubt. The sentence enhancement resulting from the jury's answer in special verdict form II should be affirmed.

D. CONCLUSION.

The State's rebuttal argument properly invited the jury to assess the credibility of defendant's testimony without implying that a negative opinion of that testimony in anyway offset the State's burden to prove each offense beyond a reasonable doubt. The jury's verdicts should be affirmed. Defendant's sentence should also be affirmed. Defendant's challenge to his special verdict instruction was not preserved below and

the identified error in special verdict form II is harmless beyond a reasonable doubt.

DATED: OCTOBER 25, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/25/11 Joshua Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

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